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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1331.

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard, *Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated, *Respondents.*

MOTION OF GIRARD COLLEGE ALUMNI FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND ACCOMPANYING BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1331.

REVELLE W. BROWN, ET AL., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION OF GIRARD COLLEGE ALUMNI FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE.*

The Girard College Alumni respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Counsel for the Petitioners and counsel for the City of Philadelphia have consented to the filing of this brief, but counsel for the other Respondents have refused such consent.

Girard College Alumni is a corporation among whose purposes are to perpetuate and honor the memory of Stephen Girard and to be of service to Girard College.

The decision of the United States Court of Appeals of the Third Circuit is inconsistent with the provisions of the

Fourteenth Amendment and the decisions of this Court in that it

1. Treats the Fourteenth Amendment as if it were applicable to a purely private charity created by the will of a Philadelphia testator, the trust under which has for nearly ten years been administered by private trustees without assistance from the State, without compulsion by the State and without contribution from the State.

2. While purporting to enforce the Fourteenth Amendment the decision of the court below grants a preferred status to some, but not all, of those who were not named by Girard as beneficiaries of his will.

3. The special rights made available by the decision of the court below have not been "made available to all on equal terms," *Brown, et al., v. Board of Education,* 347 U. S. 483, 493 (1954), but the decision has granted preferred treatment to a certain portion of the general public, selected by the Court of Appeals, and has thus denied the beneficiaries of Girard's will the equal protection of the laws.

4. The opinion of the court below has modified the effective terms of Girard's will by adding to those named by him a few more beneficiaries whom he did not name, and to that extent has frustrated his purpose to dispose of his own property as he wished.

5. The decision of the court below denies to beneficiaries named in the will full opportunity to enjoy what is rightfully theirs under its terms.

Petitioners desire to file the attached brief in order to bring these matters to the attention of the court, since petitioners believe that their consideration is essential to a

full understanding of the question involved in this case and the matters referred to have not been raised in the brief filed by the Petitioners for the writ of certiorari.

WHEREFORE it is respectfully requested that this Motion for Leave to File a Brief *amicus curiae* be granted and the views expressed in that brief be considered by this Court in resolving the question presented by the Petitioners for the writ.

Respectfully submitted,

PHILIP PRICE,
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Girard College Alumni.

DECHERT, PRICE & RHOADS,
Of Counsel.

April 24, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1331.

REVELLE W. BROWN, ET AL., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF GIRARD COLLEGE ALUMNI, *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR CERTIORARI.

ARGUMENT.

It is the position of Girard College Alumni that the decision of the Circuit Court of Appeals is in conflict with the Fourteenth Amendment and with the decisions of this Court.

It was in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia,* 357 U. S. 570 (1958), *rehearing denied,* 358 U. S. 858 (1958), that this Court dismissed an

appeal from, and denied a petition for certiorari to review, the decision of the Supreme Court of Pennsylvania, *Girard College Trusteeship,* 391 Pa. 434 (1958), which, in compliance with the teaching of this Court in this Estate, *Vidal v. Girard's Executors,* 43 U. S. (2 Howard) 127, 188 (1844); *Girard v. Philadelphia,* 74 U. S. (7 Wall.) 1, 12-13 (1868), had affirmed the decrees of the Orphans' Court of Philadelphia County, removing municipal trustees and appointing private, independent trustees that could give effect to the terms of the will and maintain Girard College as a school for "poor male white orphan children" (44a) [1]. In that case the Supreme Court of Pennsylvania said of the trust under Girard's will:

> "What keeps such a charity, so created and restricted, from constituting a violation of the 'equal protection' clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits." (p. 455).

The question is whether this private charity may continue to operate in accordance with the terms of the testator's will or whether the so-called discrimination [2] in the administration of Girard's bounty must be ended merely because for many years the trust had been lawfully managed by the Board of City Trusts of Philadelphia as a result of the compulsion that Girard was under, when he wrote his will, to select a perpetual trustee, *Girard Estate,* 4 D. & C. 2d 671, 714 (Pa. 1955) and *Girard Will Case,* 386

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1. Page numbers followed by "a" refer to pages of the Appellants' Appendix in the Circuit Court of Appeals.

2. Negroes have never been *excluded* from Girard College; they simply were not named, along with many others, as beneficiaries of the trust. The only persons excluded from Girard College are ministers (55a-56a). See *Vidal v. Girard's Executors,* 43 U. S. (2 Howard) 127, 197 (1844).

Pa. 548, 569 (1956), because the trust has been administered in conformity with the laws of Pennsylvania and because the courts of Pennsylvania have taken appropriate action to enable the terms of the will to be carried out. The court below has held that the Fourteenth Amendment forbids its continuance in accordance with its terms and that the income from Girard's estate must be made available to some, although not all, of the people who were not named as beneficiaries of it, even though the trust is purely private, is for a limited group of poor children, was created and is carried out on land and in buildings that are owned by the Girard Estate, without assistance from the State, without compulsion from the State and without contribution from the State toward the operation of the charity[3] beyond the charitable tax exemption enjoyed by all charities in Pennsylvania.

Such a conclusion not only is not required by the decisions of this Court but it is actually in conflict with them.

In *Brown v. Board of Education*, 347 U. S. 483 (1954), which this Court cited as authority for its decision in *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U. S. 230 (1957), the opinion was directed exclusively to public education. The plaintiffs in that case had sought "admission to the public schools of their community on a nonsegregated basis," 347 U. S. at 487, and this Court held that where a state has undertaken to provide public education it has created "a right which must be made available to all on equal terms." 347 U. S. at 493. There is nothing in that case to suggest that a private school created by a private will and supported wholly by the private trust created by the testator should be made available not "to all on equal terms" but to a special, limited group, not named by the testator in his will but

3. Actually the State benefits from the operation of the charity through substantial tax payments that it makes (762a).

chosen by the court, whereby that select group would receive special treatment not available to any other members of the public on any terms.

In *Shelley v. Kraemer,* 334 U. S. 1 (1948) the courts below had enforced private restrictive covenants barring occupancy by Negroes of houses that they had bought from willing sellers. Thus the enforcement of the restrictive covenants interfered with the rights of the owners of property to sell it to willing buyers and with the rights of such buyers to acquire property from willing sellers. This Court held that although "restrictive agreements standing alone cannot be regarded as violative of any rights granted to petitioners by the Fourteenth Amendment," nor can "voluntary adherence to their terms," 334 U. S. at 13,[4] yet that the *enforcement* of the agreements by the state courts constituted prohibited state action. The Court noted "that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, hold and dispose of property." 334 U. S. at 10. The Court relied on *Buchanan v. Warley,* 245 U. S. 60 (1917), and *Harmon v. Tyler,* 273 U. S. 668 (1927), in which restrictions seeking to prevent persons, both white and colored, from occupying houses in certain areas solely on the basis of their color, had been enforced by the state courts. This Court held that "Participation of the State consists in the enforcement of the restrictions so defined," 334 U. S. at 13, and that the Fourteenth Amendment barred such action. Emphasizing the affirmative interposition of state power in order to prevent the free exercise of property rights by persons on equal terms, the Court said "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as

4. Cf. also *U. S. v. Guest,* 383 U. S. 745, 755 (1966).

they see fit." There the states had enforced the covenants and thus "denied rights of property available to other members of the community" and the "full enjoyment of those rights on an equal footing." 334 U. S. at 19. The Court made clear that when the effect of state action "is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this court to enforce the constitutional commands," 334 U. S. at 20, but did not suggest that the Fourteenth Amendment required any court to change the terms of a will and expand it to include a few more people than the testator had named. Continuing, this Court said, "Because of the race or color of these petitioners they had been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." 334 U. S. at 20-21. However, the court below has ignored this fundamental feature and accorded to its favored few rights in the Girard trust which have never been "enjoyed as a matter of course by other citizens of different race or color" or enjoyed "as a matter of course" by any citizens whatever except the very limited group specified by Girard in his will.

This Court also said that "a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws". 334 U. S. at 21. This, however, is far from saying that the decree of a state court, which simply removed trustees who had become incapable as a matter of law, and because of a change in the law, of carrying out the intent of a testator, and substituted instead private persons who did not suffer from that disability and accordingly were able to accomplish the legitimate and lawful purposes of the testator, was itself a violation of "the guaranty of the equal protection of the laws." Indeed it was in fact no more than an effort by the state

court, which the court below would frustrate, to make effective Girard's attempt to dispose of his property to or for the benefit of persons of his own choice, which was one of the "civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment." 334 U. S. at 10.

The decree of the Orphans' Court did not *require* the new trustees to do anything in respect of admissions to Girard College. *Girard Estate,* 7 Fiduciary Reporter 606 (Pa. 1957). They were free to carry out the terms of the will and equally free to petition the court for leave to depart from any provision of the will that they deemed inimical to the purposes of the testator. Thus this case differs fundamentally from *Sweet Briar Institute v. Button,* 387 U. S. 423 (1967) and C. A. No. 66-C-10-L, W. D. Va. (July 14, 1967), (unreported) where the Attorney General of Virginia sought to *compel* the trustees of a school established for white girls to refuse admission to Negro students, even though the trustees desired to admit them.

In *Evans v. Newton,* 382 U. S. 296 (1966) this Court held that a public park, to which all members of the public except Negroes had been admitted and which for years had been "an integral part of the City of Macon's activities" and "was swept, manicured, watered, patrolled and maintained by the City as a public facility for whites only, as well as granted tax exemption, ..." acquired a momentum "as a public facility . . . which (was) . . . not dissipated *ipso facto* by the appointment of 'private' trustees." 382 U. S. at 301. The Court also pointed out that there "had been no change in municipal maintenance and concern over this facility" and held that the Court could not say "that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U. S. at 301.

It is clear from this that the public park in Macon is far different from Girard College, a private school supported wholly by the funds received from Girard through the Girard Estate, which had been supervised by public trustees whose only public function was to see that the terms of the will were properly carried out, which was never "an integral part of the City" of Philadelphia's activities, which was never a public facility in any sense of the word but was limited by the terms of the will to a very small sector of all the children available for education. "The service rendered" by the private park in Macon was described as "municipal in nature" whereas the service rendered by Girard College is private in nature [5] since it has never purported to assume any municipal obligation other than teaching a very small group of white boys of specified age who suffer both from the infirmity of poverty and the lack of a father. It is thus not "open to every white person" and there is many a "selective element other than race." 382 U. S. at 301. Since it never had a "public character" it is not and never has been such "a public institution subject to the command of the Fourteenth Amendment" as was dealt with in that case. 382 U. S. at 302.

Girard College is now and always has been a purely private charity for a special limited class of beneficiaries, who may be drawn from points outside of Philadelphia or even of Pennsylvania, and there is nothing in the Fourteenth Amendment or in *Evans v. Newton* that requires any court to enlarge the class just a little bit but without making it truly public or having it serve all on equal terms.

The Court recognized the right to conduct a restricted, religious school which served a limited but far larger group

5. Unlike the Macon park no streets run through the Girard College grounds (614a, 615a, 616a).

than does Girard College, as was approved by this Court in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), but did not suggest that the "nondiscriminatory educational facilities," later described in *U. S. v. Price,* 383 U. S. 787, 806 (1966) as "fundamental rights" protected by the Fourteenth Amendment, must be supplied by any educational institution other than one which is truly public and affords an opportunity for learning "which must be made available to all on equal terms." *Brown v. Board of Education,* 347 U. S. 483, 493 (1954).

What the court below has decided does violence to the principles announced by this Court. While pretending that Girard College is a public school and adopting the fiction that it must serve "all on equal terms," it proceeds to select a chosen few to receive, not educational advantages made available to all on equal terms, but very special advantages, including free clothing, board and lodging, along with special training not available to any one else, pursuant to Girard's desire to afford the beneficiaries named in his will "a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds" (44a). This Girard declared to be his "primary object" (62a).

Public education in Pennsylvania is not restricted to boys who are white, poor, without a father, between certain specified ages, and with first preference given to those who were born in Philadelphia, next to those born elsewhere in Pennsylvania, next to those born in New York City and lastly to those born in New Orleans (53a-54a). What the court below has done, under the pretence of giving effect to the Fourteenth Amendment, is not to recognize "a right which must be made available to all on equal terms," *Brown v. Board of Education,* 347 U. S. 483, 493 (1954), but instead it has created a preferred class, which was not

named by Girard in his will, but which the court below has selected to be treated as if it had been,[6] and which is to enjoy special advantages (257a, 258a, 302a, 318a, 398a, 401a-402a, 416a-418a, 432a, 632a, 633a), that will not be available to any girl or to any boy who is not poor, who has a father, who is outside the specified age limits (246a, 294a), and who cannot meet the standards for admission set by the trustees (299a, 319a, 411a-413a, 424a-425a, 449a, 479a).

This does not afford anyone the "equal protection of the laws" contemplated by the Fourteenth Amendment. It is in fact a perversion of the Fourteenth Amendment in order to serve a philosophical purpose and achieve a sociological result which presently seems desirable to the court below.

The children favored by the decision of the court below will receive their reward at the expense of those named by Girard himself to receive his bequest. Unlike a park, the capacity of Girard College, both physically and financially, is limited, and every one who has been selected by the court below to attend the College will displace one of those chosen by Girard himself. Who will compensate beneficiaries named in the will for being deprived of what is rightfully theirs? The decision of the court below is in effect a declaration that the Fourteenth Amendment has now ceased to provide "the equal protection of the laws" and has become instead a vehicle for sharing the wealth of others by persons currently being favored by the courts, in this case non-white male orphans alone out of all the people not named in the will, and that no charitable gift, which does not purport to benefit all mankind on a basis of equality, may be given effect if it is dependent for its administration

6. This was forecast in the Stay Order of the Court of Appeals, infra p. 15.

on the application by state courts of general state laws relating to wills and trusts. It is also at variance with the teaching of this Court in *Pierce v. Society of Sisters*, 268 U. S. 510, 534 (1924).

CONCLUSION.

It is accordingly urged that the petition for certiorari be granted and that the decision of the court below be reversed.

Respectfully submitted,

PHILIP PRICE,
Attorney for Girard College Alumni.

DECHERT, PRICE & RHOADS,
Of Counsel.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16,721.

(Caption Omitted)

Present: KALODNER and SEITZ, *Circuit Judges*, and COHEN, *District Judge*.

Upon consideration of the motion for stay of enforcement of Paragraph 2 of the Decree of the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 39404, entered July 5, 1967, pending disposition of appellants' appeal from said Decree,

It is ORDERED that enforcement of Paragraph 2 of said Decree will be stayed until disposition of the instant appeal by this Court, or further Order of the Court;

It is FURTHER ORDERED that this Stay Order is conditioned upon the following stated conditions, and the undertaking of the appellants to comply therewith, such undertaking to be expressed in writing and filed with the Clerk of this Court on or before September 25, 1967:

(1) Any of the seven individual plaintiffs who reached the age of eleven years either prior to entry of the instant Stay Order or during its existence, will be considered for admission to Girard College without regard to the fact that they had become eleven years of age;

(2) Application by any members of the plaintiff class for admission to Girard College filed prior to the time the applicant reached the age of eleven years will not be denied by the appellant Trustee of Girard College on the ground that applicant had passed his eleventh birthday if and when the said Decree entered by the District Court for the Eastern District of Pennsylvania in Civil Action No. 39404 on July 5, 1967 ultimately becomes effective, and such applications of otherwise qualified orphans shall be given consideration by the said Trustees in accordance with the priorities established in Paragraph 6 of Section XXI of the Will of Stephen Girard;

AND IT IS FURTHER ORDERED that copies of the instant Stay Order be published once a week during its pendency, at the cost of the appellants, in the following listed publications:

Philadelphia Evening Bulletin
Philadelphia Daily News
Philadelphia Inquirer
Philadelphia Legal Intelligencer
Philadelphia Tribune

By THE COURT,

KALODNER,
Circuit Judge.

Dated: September 15, 1967